

INTERNATIONAL COURT OF JUSTICE
DIFFERENCE RELATING TO
IMMUNITY FROM LEGAL PROCESS
OF A SPECIAL RAPPORTEUR OF
THE COMMISSION ON HUMAN RIGHTS

WRITTEN STATEMENT
SUBMITTED ON BEHALF OF
THE SECRETARY-GENERAL OF THE UNITED NATIONS

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INTRODUCTION

1. By its decision 1998/297, adopted by consensus on 5 August 1998 and entitled "Social and Human Rights Questions: Human Rights" (Dossier No. 61), the Economic and Social Council (hereinafter the "Council" or "ECOSOC") requested the International Court of Justice to give its advisory opinion, on a priority basis, "on the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations [(hereinafter the "Convention")] in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, taking into account the circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General [(Dossier No. 59, E/1998/94)], and on the legal obligations of Malaysia in this case". In operative paragraph 2 of that decision, the Council "calls upon the Government

of Malaysia to ensure that all judgements and proceedings in this matter in the Malaysian courts are stayed pending receipt of the advisory opinion of the International Court of Justice, which shall be accepted as decisive by the parties".

2. The circumstances leading to this request for an advisory opinion pertain to a difference that has arisen between the United Nations and the Government of Malaysia, within the meaning of Section 30 of the Convention, with respect to the immunity from legal process of Dato' Param Cumaraswamy, the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers (hereinafter, the "Special Rapporteur"). At issue is the authority of the Secretary-General to determine whether or not the words spoken by Dato' Param Cumaraswamy in an interview and subsequently published in an article entitled "Malaysian Justice on Trial" in the November 1995 issue of a British magazine entitled International Commercial Litigation (Dossier No. 14) were spoken in the course of the performance of his mission as Special Rapporteur and, if so, whether under international law, the Government of Malaysia has an obligation to give effect to the Secretary-General's assertion of the Special Rapporteur's immunity from legal process with respect thereto.

3. The facts summarized in Part I below include both those constituting the background to the question submitted to the Court, as well as an account of the proceedings within the Council leading to that request, insofar as these facts appear material to the question addressed to the Court. The facts set forth are supported by the cited documents contained in the Dossier, which is being transmitted to the Court in accordance with Article 65, paragraph 2, of its Statute.

4. Part II establishes the status of the Special Rapporteur as an expert on mission within the meaning of Article VI of the Convention. Part III discusses the provisions of Article VI of the Convention, in particular Article VI, Section 22(b), pertaining to the immunity from legal process of the Special Rapporteur. Part IV analyzes the Secretary-General's rights and duties with respect to the assertion or waiver of the privileges and immunities of experts on missions under Article VI, Section 23, of the Convention. Part V relates to the obligations of the Government of Malaysia pursuant to Section 34 of the Convention.

5. The final part of the Statement, Part VI, contains the conclusions from the analyses made, and especially those concerning the authority of the Secretary-General and the obligations of the Government of Malaysia with respect to the immunity from legal process in the particular case of Dato' Param Cumaraswamy.

I. SUMMARY OF FACTS GIVING RISE TO THE REQUEST

A. Appointment and mandate of Dato' Param Cumaraswamy as the Special Rapporteur

6. On 21 April 1994, the Chairman of the Commission on Human Rights (hereinafter the "Commission"), following consultations with the Bureau, appointed Dato' Param Cumaraswamy, a national of Malaysia, as Special Rapporteur (Dossier No. 2) with the office and mandate established by the Commission on Human Rights in its resolution 1994/41 of 4 March 1994 (Dossier No. 1). The Council approved the Commission's action in its decision 1994/251 of 22 July 1994 (Dossier No. 3).

7. The Special Rapporteur's mandate, established by the Commission in resolution 1994/41 (Dossier No. 1), consists of the following tasks: "(a) To inquire into substantial allegations transmitted to him or her and report his or her conclusions thereon; (b) To identify and record not only attacks on the independence of the judiciary, lawyers and court officials but also progress achieved in protecting and enhancing their independence, and make concrete recommendations including the provision of advisory services or technical assistance when they are requested by the State concerned; and (c) To study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers".

8. In his First Report (Dossier No. 4, para. 101) issued on 6 February 1995, the Special Rapporteur elaborated his method of work and stated in connection with his mandate to investigate complaints that, inter alia, "it is necessary that the existing standards of judicial independence and the independence of the legal profession enjoy wide dissemination. Emphasis should be placed on achieving such dissemination not only through the efforts of the Special Rapporteur, but also through the publications and promotional activities of the Centre for Human Rights".

9. In operative paragraph 4 of its resolution 1995/36 of 3 March 1995 (Dossier No. 5), the Commission on Human Rights "note[d] with appreciation the determination of the Special Rapporteur to achieve as wide a dissemination as possible of information about existing standards relating to the independence and impartiality of the judiciary and the independence of the legal profession in conjunction with the publications and promotional activities of the Centre for Human Rights".

10. In a letter dated 29 August 1995, the Special Rapporteur wrote to the Chairman of the Fifty-first session of the Commission on Human Rights, also a national of Malaysia, indicating his obligation to investigate complaints about the Malaysian judiciary, and asking the Chairman to bring his concerns to the attention of the Prime Minister of Malaysia (Dossier No. 9).

11. In November 1995, the article "Malaysian Justice on Trial" was published in the British magazine *International Commercial Litigation*, containing quotes from an interview given by Dato' Param Cumaraswamy to the author. The article identified Dato' Param Cumaraswamy as the Special Rapporteur on the independence of judges and lawyers and described the global mandate entrusted to him by the United Nations Commission on Human Rights (Dossier No. 14).

12. The Special Rapporteur's Second Report issued on 1 March 1996 (Dossier No. 10), contained a section on Malaysia (see paragraphs 158-165) similar in content to the information conveyed in the above-mentioned interview. Paragraph 152 of the same report indicates that the Special Rapporteur also gave a press statement on Hong Kong. His Third Report issued on 18 February 1997 (Dossier No. 11) also contained a section on Malaysia (see paragraphs 122-134), including information on law suits filed against him in the Malaysian civil courts arising out of the words attributed to him in the article referred to in paragraph 11 above. The Third Report also refers to the promotional and media activities of the Special Rapporteur, including, in particular paragraphs 32 - 34 and 39 on press interviews in Sri Lanka and the Special Rapporteur's press statement on his preliminary observations on his mission in Peru.

13. In its resolution 1997/23 of 11 April 1997 (Dossier No. 7), the Commission decided to extend the mandate of the Special Rapporteur for a further period of three years and, in operative paragraph 4 thereof, again "note[d] with appreciation the determination of the Special Rapporteur to achieve as wide a dissemination as possible of information about existing standards relating to the independence and impartiality of the judiciary and the independence of the legal profession in conjunction with the publications and promotional activities of the Centre for Human Rights".

14. The Special Rapporteur's Fourth Report was issued on 12 February 1998 (Dossier No. 12), which also contained a section on Malaysia (see paragraphs 106-116) which further reported on the status of the law suits.

B. The law suits against the Special Rapporteur

15. On 24 August 1995, an article in a Malaysian newspaper (Dossier No. 13) reported that the United Nations Special Rapporteur would be investigating the Malaysian system of justice and referred to a statement he had made on complaints about manipulation of that system. In that article, the Special Rapporteur was reported to have stated that "complaints are rife that some highly placed personalities in Malaysia including those in the business and corporate sectors are manipulating the Malaysian system of justice and thereby undermining the due administration of independent and impartial justice by the courts". These matters, including a critical statement by the Bar Council of Malaysia, were reported in the Special Rapporteur's second report to the Commission on Human Rights (Dossier No. 10, paragraphs 159-160).

16. The Special Rapporteur made similar remarks in an article published in the November 1995 issue of the British magazine *International Commercial Litigation* (Dossier No. 14, paragraph 11 supra) after the publication of which two commercial companies in Malaysia asserted that the article contained defamatory words that had "brought them into public scandal, odium and contempt" and filed a law suit against Dato' Param Cumaraswamy for damages amounting to 60 million Malaysian Ringgit (hereinafter "MR") (approximately USD \$24 million at the then current exchange rate) including exemplary damages for libel and slander (Dossier Nos. 15 and 20).

17. Acting on behalf of the Secretary-General, the Legal Counsel of the United Nations considered the circumstances of the interview and of the passages of the article at issue and determined that Dato' Param Cumaraswamy was interviewed in his official capacity as Special Rapporteur and that the article clearly referred to and acknowledged his United Nations capacity. The Legal Counsel noted that the article specified the Special Rapporteur's global mandate to investigate allegations concerning the independence of the judiciary, and that the quoted passages related to such allegations. As a result, on 3 January 1997 (Dossier No. 21), the Director and Deputy to the Legal Counsel issued a letter addressed "To Whom it May Concern" notifying the competent Malaysian authorities that the United Nations maintained the immunity from legal process of its Special Rapporteur pursuant to Article VI, Section 22(b), of the Convention to which Malaysia has been a party since 28 October 1957 without reservation. On 6 January 1997, the Director and Deputy to the Legal Counsel re-issued the letter addressed "To Whom it May Concern" to refer specifically to the High Court of Kuala Lumpur and the docket number of the afore-mentioned law suit (Dossier No. 22). Then, on 15 January 1997, the Legal Counsel, in a note verbale addressed to the Permanent Representative of Malaysia (Dossier No. 27), requested "the competent Malaysian authorities to promptly advise the Malaysian courts of the Special Rapporteur's immunity from legal

process" with respect to that particular complaint. The Secretary-General issued a note verbale on 7 March 1997 (Dossier No. 29) informing the Government of Malaysia that he had determined that "the words which constitute the basis of plaintiffs' complaint in this case were spoken by the Special Rapporteur in the course of his mission" and that the Secretary-General "therefore maintains that Dato' Param Cumaraswamy is immune from legal process with respect thereto".

18. A draft of a certificate that the Minister for Foreign Affairs proposed to file with the trial court was discussed in a meeting on 5 March 1997 by representatives of the Office of Legal Affairs and the Permanent Mission of Malaysia to the United Nations (Dossier No. 28). At this meeting, it was made clear to the Malaysian representatives that the certificate was inadequate. The Minister for Foreign Affairs nevertheless on 12 March 1997 filed the certificate in the form originally proposed (Dossier No. 31). In particular, the final sentence of that certificate in effect invited the trial court to determine at its own discretion whether the words giving rise to the complaint were spoken in an official capacity and whether the immunity applied. Moreover, the certificate failed to refer in any way to the note verbale which had been issued by the Secretary-General a few days earlier and that had in the meantime been filed with the court (see paragraph 17 above). Despite repeated requests by the Legal Counsel (see Dossier Nos. 28, 32 and 33), the Minister for Foreign Affairs refused to amend his certificate, or to supplement it, in the manner urged by the United Nations.

19. On 28 June 1997, the trial judge of the Malaysian High Court for Kuala Lumpur delivered her judgement (Dossier No. 35) in which she concluded that she was unable to hold that the Defendant is absolutely protected by the immunity he claims, in part because she considered that the Secretary-General's note was merely an opinion that has no more probative value than a document which appears wanting in material facts and has no binding force upon the court. The judge stated that the Minister for Foreign Affairs' certificate would appear to be no more than a bland statement as to a state of fact pertaining to the Defendant's status and mandates as a Special Rapporteur and appears to have room for interpretation. The judge indicated that the question whether Dato' Param Cumaraswamy's words were within the scope of the performance of his mission was a question to be answered at trial. She also stated that the court's jurisdiction was not ousted by the Mazilu case since decisions of the International Court of Justice are not binding on the court on a point of public international law. She therefore held that she had jurisdiction to hear the case on the merits and ordered that the Special Rapporteur's motion be dismissed with costs, that costs be taxed and paid forthwith by him and that he file and serve his defense within 14 days from the date of the Order.

20. On 30 June, 7 July and 8 July 1997, the Legal Counsel thereupon sent notes verbales and a letter to the Permanent Representative of Malaysia (Dossier Nos. 37 - 39), inter alia, calling upon the Malaysian Government to intervene in the current proceedings; to hold the United Nations and Dato' Param Cumaraswamy harmless in respect of the expenses he had already incurred or that were being taxed by the Court in respect of the proceedings; and to support a motion to have the High Court proceedings stayed until the matter of his immunity was definitively resolved between the United Nations and the Government. The Legal Counsel referred to the provisions for the settlement of differences arising out of the interpretation and application of the Convention that might arise between the Organization and a Member State, which are set out in Section 30 of the Convention, and indicated that if the Government decided that it cannot or does not wish to protect and to hold harmless the Special Rapporteur in the indicated manner, a difference within the meaning of those provisions might be considered to have arisen between the Organization and the Government of Malaysia.

21. On 9 July 1997 another law suit (Dossier No. 41) was filed against the Special Rapporteur, based on precisely the same passages of the article referred to in paragraph 11 and claiming damages in an amount of MR 60 million (approximately \$24 million at the then current exchange rate). On 11 July 1997, the Secretary-General issued another note verbale corresponding to that issued on 7 March 1997 and submitted it to the Permanent Representative of Malaysia with the request that it be presented formally to the competent Malaysian court by the Government (Dossier Nos. 43 and 44).

22. On 20 October 1997, the Court of Appeal delivered its opinion (Dossier No. 45) denying Dato' Param Cumaraswamy's substantive appeal with costs and upholding the High Court judgment of 28 June 1997 (Dossier No. 35). In its opinion, the Court of Appeal concluded that it was for the Malaysian courts to determine in which capacity Dato' Param Cumaraswamy had spoken the words giving rise to the complaint, and if in his official capacity, whether he had exceeded his mandate in doing so. The Court of Appeal indicated that the Convention merely confirms the Secretary-General's power to waive immunity; it does not confer any power or authority upon him to declare the words complained of were spoken by Dato' Param Cumaraswamy in his capacity as Special Rapporteur.

23. On 23 October 1997 and 21 November 1997, new plaintiffs filed a third and fourth lawsuit (Dossier Nos. 46 and 50) against the Special Rapporteur for MR 95 million (US \$ 40 million at the then current exchange rate) and MR 60 million (US \$ 24 million at the then current exchange rate) respectively. On 27 October 1997 and 21 November 1997, the Secretary-General issued identical certificates of the Special Rapporteur's immunity (Dossier Nos. 47 and 51) in respect of these suits.

24. On 7 November 1997, the Secretary-General wrote to the Prime Minister of Malaysia (Dossier No. 49) concerning the difference arising between the United Nations and the Government of Malaysia and adverting to the possibility of resorting to the International Court of Justice pursuant to Section 30 of the Convention.

25. On 19 February 1998, the Federal Court of Malaysia delivered an oral ruling denying Dato' Param Cumaraswamy's application for leave to appeal stating that "we are not dealing with a sovereign or a full-fledged diplomat.... he is someone called a Rapporteur who has to act, in the present case, within a mandate of, in layman's terms, an unpaid, part-time provider of information." (Dossier No. 55)

26. The Secretary-General then appointed a Special Envoy, Maître Yves Fortier, a national of Canada, who on 26 and 27 February 1998, undertook an official visit to Kuala Lumpur in an effort to reach an agreement with the Government of Malaysia on a joint submission to the International Court of Justice. Following that visit, the Government of Malaysia indicated its desire to reach a settlement of the matter outside both the national courts and the International Court of Justice (Dossier No. 56). Between 12 March and 23 July 1998, intensive efforts to settle the matter amicably failed to achieve any result save the postponement of all proceedings in the four lawsuits until September 1998.

27. Maître Fortier undertook a second official visit to Kuala Lumpur on 25 - 28 July 1998 during which he concluded that the Government of Malaysia would not participate in a negotiated settlement with the United Nations nor would it participate in preparing a joint submission to the Council. As the United Nations and the Government of Malaysia did not agree to have recourse to another mode of settlement, the Secretary-General's Special Envoy

therefore advised that the matter should be referred to the Council to request an advisory opinion from the International Court of Justice.

C. The proceedings in the Council

28. On 28 July 1998, the Secretary-General issued a note in the Economic and Social Council entitled "Privileges and immunities of the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers" (Dossier No. 59).

29. On 30 July 1998, Maître Fortier reported to the Secretary-General that the Government of Malaysia had agreed that the matter should be referred to the Court through the Council.

30. On 3 August 1998, the Secretary-General issued an Addendum (Dossier No. 60) to his Note of 28 July 1998 informing the Council that, on 1 August 1998, Dato' Param Cumaraswamy had received a Notice of Taxation and Bill of Costs, dated 28 July 1998, indicating that costs for the application in Federal Court would be assessed on Friday, 18 September 1998 and that, on the same day, he had also received a Notice of Taxation and Bill of Costs, dated 29 July 1998, indicating that Plaintiffs' costs for the Court of Appeal would be assessed on 4 September 1998.

31. On 5 August 1998, at its resumed substantive session, the Council adopted, by consensus, decision 1998/297 referring the matter to the International Court of Justice and calling upon the Government of Malaysia to stay all judgements and proceedings in its national courts pending receipt of the advisory opinion (Dossier No. 61).

II. THE SPECIAL RAPPORTEUR IS AN EXPERT ON MISSION WITHIN THE MEANING OF ARTICLE VI, SECTION 22 OF THE CONVENTION OF THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

32. In its advisory opinion of 15 December 1989, *"Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations"*, (hereinafter the "Mazilu opinion"), Advisory Opinion, I.C.J. Reports 1989, p. 177, the Court unanimously was of the opinion that "Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations is applicable in the case of Mr. Dumitru Mazilu as a special rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities" (at p. 198). In paragraph 52 of its opinion, the Court had stated that it "takes the view that Section 22 of the General Convention is applicable to persons (other than United Nations officials) to whom a mission has been entrusted by the Organization and who are therefore entitled to enjoy the privileges and immunities provided for in this Section with a view to the independent exercise of their functions" (at pp. 195-196).

33. In the established practice of the Organization, as confirmed by the Mazilu opinion, the Special Rapporteurs of the Commission on Human Rights and its sub-commissions are accorded the status of experts on missions and are therefore entitled to enjoy the privileges and immunities provided for under Section 22 of the Convention. As a special rapporteur of the Commission on Human Rights, Dato' Param Cumaraswamy is therefore an expert on mission and is entitled to enjoy the privileges and immunities provided for under Section 22 of the Convention.

III. THE SPECIAL RAPPORTEUR IS ENTITLED TO IMMUNITY FROM LEGAL PROCESS UNDER ARTICLE VI, SECTION 22(b) OF THE CONVENTION

34. According to Article 105, paragraph 1, of the Charter of the United Nations,

"The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes."

Furthermore, Article 105, paragraph 2, provides that,

"Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization."

Lastly, Article 105, paragraph 3, states that the General Assembly may propose conventions to the Members of the United Nations with a view to determining the details of the application of paragraphs 1 and 2.

35. Acting in conformity with Article 105 of the Charter, the General Assembly, in its resolution 22 (I) A of 13 February 1946, adopted the Convention on the Privileges and Immunities of the United Nations (Dossier No. 68). The Convention, inter alia, determines the privileges and immunities enjoyed by the United Nations as such (Articles II and III) and those enjoyed by Representatives of Members of the United Nations (Article IV), by Officials of the Organization (Article V) and by Experts on Missions for the United Nations (Article VI). Article VI, Section 22, of the Convention provides as follows:

"Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular they shall be accorded:

- (a) immunity from personal arrest or detention and from seizure of their personal baggage;
- (b) in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations;
- (c) inviolability for all papers and documents;
- (d) for the purpose of their communications with the United Nations, the right to use codes and to receive papers or correspondence by courier or in sealed bags;
- (e) the same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;

(f) the same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys."

The privileges and immunities accorded to experts on missions by Article VI, Section 22, of the Convention are strictly functional. This appears from the chapeau of Section 22, which refers to "such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions", and applies to the particular rights listed in the six sub-paragraphs. Therefore, in accordance with Article VI, Section 22(b), experts on mission for the United Nations enjoy immunity from legal process of every kind in respect of words spoken or written and acts done by them in the course of the performance of their missions. Thus, as an expert on mission, Dato' Param Kumaraswamy is entitled to immunity from legal process of every kind in respect of words spoken or written and acts done by him in the course of the performance of his mission as a Special Rapporteur of the Commission on Human Rights.

36. The Court, in the Mazilu opinion, has made it clear that this immunity applies in the State of which an expert on mission is a national:

"51. The question whether experts on missions can invoke these privileges and immunities against the States of which they are nationals or on the territory of which they reside has also been raised. In this connection, the Court notes that Section 15 of the General Convention provides that the terms of Article IV, Sections 11, 12 and 13, relating to the representatives of Members "are not applicable as between a representative and the authorities of the State of which he is a national or of which he is or has been the representative". Article V, concerning officials of the Organization, and Article VI, concerning experts on missions for the United Nations, do not, however, contain any comparable rule. This difference of approach can readily be explained. The privileges and immunities of Articles V and VI are conferred with a view to ensuring the independence of international officials and experts, in the interests of the Organization. This independence must be respected by all States including the State of nationality and the State of residence. Some States parties to the General Convention... have indeed entered reservations to certain provisions of Article V, or of Article VI itself..., as regards their nationals or persons habitually resident on their territory. The very fact that it was felt necessary to make such reservations confirms the conclusion that, in the absence of such reservations, experts on missions enjoy the privileges and immunities provided for under the Convention in their relations with the States of which they are nationals or on the territory of which they reside.

"52. To sum up, the Court takes the view that Section 22 of the General Convention is applicable to persons (other than United Nations officials) to whom a mission has been entrusted by the Organization and who are therefore entitled to enjoy the privileges and immunities provided for in this Section with a view to the independent exercise of their functions. During the whole period of such missions, experts enjoy these functional privileges and immunities whether or not they travel. They may be invoked as against the State of nationality or of residence unless a reservation to Section 22 of the General Convention has been validly made by that State." (I.C.J. Reports 1989, at pp. 22-23)

As Malaysia acceded to the Convention on 28 October 1957 without any reservation, the Special Rapporteur's immunity from legal process, under Article VI, Section 22 (b) of the Convention, may therefore be invoked as against the State of his nationality, Malaysia.

37. It should also be noted that there exist no legal rules preventing the appointment or election of an expert to carry out a mission in his own country. Indeed, when special rapporteurs are entrusted with a thematic as opposed to a country-specific mandate, they are called upon to investigate complaints related to their mandate wherever they arise, including in their own countries. Such persons, as confirmed above by the Court, are entitled to all the privileges and immunities referred to in Article VI, Section 22, of the Convention.

IV. SUBJECT TO ARTICLE VIII OF THE CONVENTION, THE SECRETARY-GENERAL HAS THE EXCLUSIVE AUTHORITY, UNDER ARTICLE VI, SECTION 23 OF THE CONVENTION TO WAIVE OR MAINTAIN THE PRIVILEGES AND IMMUNITIES ENJOYED BY EXPERTS ON MISSION UNDER SECTION 22

A. The legal basis for the Secretary-General's exclusive authority

38. Article VI, Section 23 of the Convention provides as follows:

"Privileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations." (emphasis added)

39. The authority granted in Article VI, Section 23, of the Convention to waive the immunity of any expert on mission is vested exclusively in the Secretary-General, and waiver cannot be effected instead by the expert on mission himself or the national courts of a Member State party to the Convention. That the Secretary-General has exclusive authority in this regard is borne out not only by the terms of Article VI, Section 23 but also by the provisions of Article VIII, Sections 29 and 30, for the settlement of disputes regarding all differences arising out of the interpretation or application of the Convention. The Convention foresees that disputes are not to be settled by the national courts of a Member State party to the Convention, but that differences between the United Nations and a Member are to be decided by having recourse to the advisory jurisdiction of the Court. In accordance with Section 30, the Court's advisory opinion shall be accepted as decisive by the parties. The fact that such a procedure is mandated demonstrates the weakness of the assumption that national courts may adjudicate the question whether certain words or acts were spoken, written or done in the course of the performance of a mission for the United Nations. (Dossier No. 81)

40. The Court, in its advisory opinion of 11 April 1949 "*Reparation for Injuries Suffered in the Service of the United Nations*" (hereinafter the "Reparations Case"), Advisory Opinion, I.C.J. Reports, 1949, at p.174, stated:

"In order that the agent may perform his duties satisfactorily, he must feel that this protection is assured to him by the Organization and that he may count on it. To ensure the independence of the agent, and, consequently, the independent action of the Organization itself, it is essential that in performing his duties he

need not have to rely on any other protection than that of the Organization.... If he had to rely on [the] State, his independence might well be compromised, contrary to the principle applied by Article 100 of the Charter....

"Upon examination of the character of the functions entrusted to the Organization and of the nature of the missions of its agents, it becomes clear that the capacity of the Organization to exercise a measure of functional protection of its agents arises by necessary intendment out of the Charter." (at pp. 183-184)

This statement of the Court's opinion confirms the position consistently maintained by the United Nations, pursuant to the Convention and the Charter, that it is for the Secretary-General, on behalf of the Organization, to afford experts on mission the functional protection they are entitled to when they are acting in the course of the performance of their United Nations missions.

41. The conclusion that the Secretary-General has exclusive authority in matters of assertion and waiver of immunity is supported by Staff Regulation 1.8 (Dossier No. 105), which was established by the General Assembly in accordance with Article 101, paragraph 1, of the Charter, and which provides as follows:

"The immunities and privileges attached to the United Nations by virtue of Article 105 of the Charter are conferred in the interests of the Organization.... In any case where these privileges and immunities arise, the staff member shall immediately report to the Secretary-General, with whom alone it rests to decide whether they shall be waived." (emphasis added)

The exclusive authority of the Secretary-General is inextricably linked his role as the chief administrative officer of the Organization, under Article 97 of the Charter of the United Nations, and to Member States' obligation, under Article 100, paragraph 2, of the Charter, "to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities". The exclusively international character of the responsibilities of the Organization and its agents, both officials and experts on missions, cannot be equally and uniformly maintained throughout the world if they were subject to challenge in the national courts of each member State.

42. In a report on "Respect for the privileges and immunities of officials of the United Nations and the specialized agencies and related organizations", the Secretary-General stated that "the distinction between acts performed in an official capacity and those performed in a private capacity, which lies at the heart of the concept of functional immunity, is a question of fact which depends on the circumstances of the particular case. The position of the United Nations is that it is exclusively for the Secretary-General to determine the extent of the duties and functions of United Nations officials" (Dossier No. 113, paragraph 7). The latter statement of the Secretary-General's exclusive authority was noted by the General Assembly without objection, in its resolution 36/232 of 18 December 1981 (Dossier No. 106). Moreover, in that resolution, the Assembly, inter alia, reaffirmed the responsibility and authority of the Secretary-General as the chief administrative officer of the United Nations under the Charter; recalled Article 100 of the Charter of the United Nations, under which each Member State has undertaken to respect the exclusively international character of the responsibilities of the

Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities; recalled that the Court has held that international organizations have the power and responsibility to protect members of their staff; and appealed to certain Member States to recognize the functional immunity of a staff member asserted by the Secretary-General.

43. In subsequent resolutions, the General Assembly has repeatedly called upon the Secretary-General to act as the focal point in promoting and ensuring the observance of the privileges and immunities of officials of the United Nations by using all such means as are available to him. It has confirmed the responsibilities of the Secretary-General to safeguard the functional immunity of all United Nations officials and strongly affirmed that disregard for the privileges and immunities of officials has always constituted one of the main obstacles to the implementation of the missions and programmes assigned to the organizations of the United Nations system by Member States and called upon certain Member States to enable the Secretary-General or the executive head of the organization concerned to exercise fully the right of functional protection (See Dossier Nos. 107-112). The General Assembly has thus confirmed the exclusive authority of the Secretary-General to determine the extent of the duties and functions of United Nations officials and called for recognition of his assertions of their functional immunity. It follows that the Secretary-General has the same authority with respect to the functional immunity of experts on missions.

44. Therefore, it is for the Secretary-General alone, and not for Member States or their courts, to determine whether or not an act by an agent of the organization, be it a staff member or an expert on mission, has been performed in an official capacity or in the course of the performance of a mission for the United Nations.

B. The United Nations established practice invariably has maintained the Secretary-General's exclusive authority to assert or to waive immunity

45. As a treaty, the interpretation of the Convention is subject to the rules codified in corresponding Articles 31, paragraph 3(b), of both the 1969 Vienna Convention on the Law of Treaties and of the 1986 Convention on the Law of Treaties between States and International Organizations or between International Organizations (the latter is not yet in force but is reflective of customary international law). In particular, in interpreting the Convention, account is to be taken, in addition to its context, of inter alia "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".

46. It is the long-lasting and uncontested practice of the United Nations that the authority to determine what constitutes an "official" or "unofficial" act is vested exclusively in the Secretary-General and that the question of whether the acts concerned were official acts, cannot consistently with the Convention, be determined by a national court (See Dossier Nos. 87, 100 and 114). It is equally the established practice of the United Nations that, if the Secretary-General determines that the matter complained of is not related to official functions, then no immunity is asserted (See, for example, Dossier Nos. 72, 93, 94, 103, 104 and 115 at para. 6). Moreover, even where immunity might exist, it would always be incumbent upon the Secretary-General to waive immunity where, in his opinion, the immunity would impede the course of justice and where the immunity can be waived without prejudice to the interests of the United Nations (See, for example, Dossier Nos. 78, 92, 93, 95, 96 and 99). The United Nations position is consistent with the pronouncement in the Reparations Case wherein the

International Court of Justice emphasized the importance of the protection afforded to the staff and agents by the United Nations privileges and immunities and the vital importance to them that this protection can be relied upon (see paragraph 40 above).

47. The United Nations' position is summed up in a statement to Member States made by the Legal Counsel in the Fifth Committee of the General Assembly on 1 December 1981 (Dossier No. 84). In this statement, the Legal Counsel noted that subjecting a staff member to legal process prevented the Secretary-General from exercising his right under the international legal instruments in force to independently determine whether or not an official act had been involved. He noted that where a determination was made that no official act was involved, the Secretary-General had, by the terms of the Convention, both the right and duty to waive the immunity of any official. The Legal Counsel stated that it was not the intent of the provisions regarding immunity from legal process or the principle of functional protection to place officials above the law but to ensure, before any action was taken against them, that no official act was involved and that no interest of the Organization was prejudiced.

48. This consistent practice was clearly illustrated during the recent arrest and detention of a member of the United Nations Trust Fund for the Victims of Contemporary Forms of Slavery (hereinafter the "Fund") by the competent authorities of a Member State on the grounds, inter alia, of his participation in an unauthorized non-governmental organization involved in combating alleged slavery in the country concerned. At first, the Secretary-General informed the Government that, under the Convention, it was exclusively for the Secretary-General, and not the Government, to determine whether certain words or actions of an expert on mission fell within the performance of that expert's mission for the United Nations and that, in order to enable such a determination to be made, the Secretary-General requested urgent access to the expert on mission concerned (Dossier No. 102). When that access was given, the Secretary-General concluded, based on the information obtained, that the actions leading to the arrest and conviction were not related to the mandated functions of the expert, nor were they done in the course of the performance of a mission for the United Nations. The Secretary-General therefore could not and did not assert any immunity with respect to the particular acts complained of in that instance. The Secretary-General promptly and officially conveyed the latter conclusions to the Member of the Fund and the Member State concerned (Dossier Nos. 103 and 104).

49. In accordance with the Convention and its established practice, the United Nations maintains the view that experts performing missions for the United Nations are immune from legal process of every kind in respect of words spoken or written and acts done by them in the course of the performance of their mission (See Dossier No. 86). In accordance with Article VI, Section 23, of the Convention, however, the Secretary-General has the right and the duty to waive the immunity of any expert, in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations.

C. The Secretary-General exercised his exclusive authority to determine the scope of the Special Rapporteur's mission and the applicability of his immunity from legal process

50. In the present case, the Secretary-General at no point waived, or for that matter was ever requested to waive, the immunity from legal process of the Special Rapporteur. The Secretary-General determined that, in this particular situation, Dato' Param Cumaraswamy

had been interviewed in his official capacity as Special Rapporteur; that the article clearly referred to his official capacity and to his United Nations mandate to investigate allegations concerning the independence of the judiciary; and that the passages at issue related to such allegations. Moreover, it is within the discretion of Special Rapporteurs of the Commission on Human Rights to publicize their activities, and the Commission values such publicity as a means to raise consciousness about human rights standards and violations. Moreover, the Special Rapporteur had reported to the Commission on his working methods and intention to conduct his own promotional activities in addition to those of the Centre for Human Rights (Dossier No. 4).

51. Based on the foregoing, the Secretary-General determined that the words which constitute the basis of Plaintiffs' complaint in this case were spoken by the Special Rapporteur in the course of his mission and he, therefore, maintained that Dato' Param Cumaraswamy is immune from legal process with respect thereto (Dossier No. 29). In this regard, it should be noted that, in its resolutions 1995/36 of 3 March 1995, 1996/34 of 19 April 1996 and later in 1997/23 of 11 April 1997 and 1998/35 of 17 April 1998 (Dossier Nos. 5, 6, 7 and 8), the Commission on Human Rights has consistently noted with appreciation the Special Rapporteur's determination to achieve wide dissemination of his activities. Moreover, when it renewed the Special Rapporteur's mandate for an additional three years in its resolution 1997/23 (Dossier No. 7), the Commission, having had the benefit of three of his reports, was fully aware of the basis for his investigation of the Malaysian judiciary (Dossier Nos. 9, 10 at paras. 158-160, and 13); of his dealings with the press (See Dossier No. 10, paras. 152 and 160 and Dossier No. 11, paras. 32-34 and 39); and of the lawsuits against him in the national Malaysian courts (Dossier No. 11 at paras. 122-134). The Commission's decision to renew his mandate, therefore confirmed its approval of the Special Rapporteur's working methods as well as of the performance of his mission of which public statements were a part, including making statements to members of the press.

D. Maintaining the Special Rapporteur's immunity would not impede the course of justice

52. As the Convention provides remedies both to private plaintiffs as well as to the Governments of Member States parties to the Convention, maintaining United Nations immunities does not impede the course of justice. Section 29 of the Convention provides that,

"The United Nations shall make provisions for appropriate modes of settlement of:

"(a) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party;

" (b) Disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General."

In accordance with Section 30 of the Convention:

"All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a

Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties."

53. The Secretary-General acknowledges that cases of conflict may arise as to whether an act was "official" or whether an official or expert had exceeded his mandate, but the Convention expressly provides for appropriate modes of settlement of private law disputes if the United Nations is a party to such a dispute or if immunity has not been waived by the Secretary-General under Article VIII, Section 29; and for the referral of differences between the Organization and its Member States to the advisory jurisdiction of the Court pursuant to Section 30. These are the appropriate procedures for settlement, not the disregard or adjudication of the Secretary-General's determination by national courts.

E. Waiving the Special Rapporteur's immunity would prejudice the interests of the United Nations

54. The Secretary-General considers it most important that the principle be accepted that it is for himself alone to determine whether members of the staff of the Organization or experts on missions have spoken or written words or performed acts "in their official capacity" (in the case of officials) or "in the performance of their missions" (in the case of experts on missions). Unless recognition is accorded to the Secretary-General's determinations in this respect, it will be for national courts to determine -- and in respect of a given word or act there may be several national courts -- whether an official or an expert, or a former official or expert, enjoys immunity in respect of his or her words or acts. The adjudication of United Nations privileges and immunities in national courts would be certain to have a dangerous effect on the independence of officials and experts, who would then have to fear that at any time, whether they were still in office or after they had left it, they could be called to account in national courts, not necessarily their own, civilly or criminally, for their words spoken or written, or acts performed, as officials or experts.

55. In the absence of complete independence, human rights experts and Special Rapporteurs would hesitate to speak out against and report violations of international human rights standards. For example, in his third report, the Special Rapporteur indicated that, in the light of the civil suits pending against him in the Malaysian courts, he had decided to postpone reporting to the Commission on Human Rights on his findings on the initial complaints about the Malaysian judiciary referred to in his second report (Dossier No. 11, paragraph 134). National adjudication would inevitably frustrate and, if allowed to proliferate, potentially endanger the entire human rights mechanism of the United Nations system. Moreover, any diminution of the Secretary-General's exclusive authority to waive or maintain the privileges and immunities of experts on missions constitutes a parallel attack on his exclusive authority to preserve and protect the privileges and immunities of the United Nations itself and its officials.

56. In conclusion, the United Nations maintains, and has consistently maintained (see, for example, Dossier Nos. 81 and 85), that the Secretary-General has the exclusive authority, subject to Article VIII, Sections 29 and 30, of the Convention, to determine whether or not words or acts are spoken, written or done in the course of the performance of a mission for the United Nations and whether such words or acts fall within the scope of the mandate entrusted to a United Nations expert on mission. These matters cannot be determined by, or adjudicated

in, national courts. It is clear that if national courts could overrule the Secretary-General's determination that a word or act was spoken, written or done in the course of the performance of a mission for the United Nations, a mass of conflicting decisions would be inevitable, given the many countries in which the Organization operates. In many cases, it would be tantamount to a total denial of immunity. Likewise, it is unacceptable that what the Secretary-General determines to be an "official act" can be judged by a national court to have ceased to have been such an act because that court decides that the act is in excess of mandate. This again, would be tantamount to a total denial of immunity. The contention that it is for an official or an expert on mission or the United Nations, on his or her behalf, to prove in a particular national court that the words complained of were spoken in an official capacity; that it was within the scope of the performance of his or her mission to do so; and that the official or expert on mission in question is therefore immune from legal process with respect thereto, in and of itself constitutes a violation of their immunity and the Organization's immunity from legal process. In order to have any real meaning, the words "immunity from legal process of every kind" in Article VI, Section 22(b), of the Convention must include immunity from legal proceedings to determine the applicability and scope of that very immunity. Compelling an official or an expert on mission to prove or defend his or her functional immunity in the national courts of any Member State effectively subjects him or her to legal process and thereby violates his or her, as well as the Organization's, immunity.

V. THE GOVERNMENT OF MALAYSIA HAS AN OBLIGATION, UNDER SECTION 34 OF THE CONVENTION, TO GIVE EFFECT TO THE PRIVILEGES AND IMMUNITIES ENJOYED BY THE SPECIAL RAPPORTEUR UNDER SECTION 22(b)

A. The Government of Malaysia has an obligation to give effect to the Special Rapporteur's immunity from legal process

57. Pursuant to Section 34 of the Convention, "[i]t is understood that, when an instrument of accession is deposited on behalf of any Member, the Member will be in a position under its own law to give effect to the terms of this convention". Malaysia acceded to the Convention on 28 October 1957 without reservation.

58. In accordance with Section 34, the Government of a Member State party to the Convention has an obligation to give effect to the immunity from legal process of an expert on mission under Article VI, Section 22(b), of the Convention. At the very least, the latter obligation includes the obligation of the Government to inform its competent judicial authorities that the Secretary-General of the United Nations has determined that the words or acts giving rise to the proceedings in its national courts were spoken, written or done in the course of the performance of a mission for the United Nations and that the United Nations has therefore maintained the immunity from legal process of the expert on mission concerned with respect to those words or acts. In addition, it is also incumbent upon the Government, if necessary, to further intervene in the proceedings to uphold and ensure respect for that immunity, thereby giving it effect. International jurisprudence has confirmed that such interventions by the executive agents of a Government do not constitute interference with the independence of the judiciary.

59. The United Nations' position on this matter was the subject of a public statement made by the Legal Counsel in the Sixth Committee of the General Assembly on 6 December 1967 (Dossier No. 75). In that statement, the Legal Counsel noted that the granting of privileges and immunities necessary for the exercise of official functions is mandatory on Member States by virtue of Article 105 of the Charter. The Convention defines the immunities deemed essential in all Member States and each Member State party to the Convention is, in accordance with Section 34, bound to give effect to those privileges and immunities. In addition, the United Nations has consistently maintained that it is not for the Organization to plead the immunities of its officials and experts on mission or, for that matter, its own immunity in national courts as it is the responsibility of the Government of a Member State party to the Convention to communicate with other branches of that Government on its international legal obligations (Dossier Nos. 86 and 88).

60. By not confirming, or even referring to the certificate of immunity issued by the Secretary-General on 7 March 1997 (Dossier No. 29), the Certificate of Immunity issued by the Malaysian Minister for Foreign Affairs on 12 March 1997 (Dossier No. 31) in effect invited the national courts to conclude that it was for them to decide whether or not the Special Rapporteur spoke the words complained of in his official capacity and whether doing so was within the scope of the mandate entrusted to him by the Commission on Human Rights. By failing to amend or supplement the Minister's Certificate of Immunity, or otherwise intervene in the legal proceedings, so as to uphold or ensure respect for the Secretary-General's certificate, the Government of Malaysia implicitly authorized its courts to disregard the Secretary-General's determination as to the capacity and scope of the mission of the Special Rapporteur and thereby failed to fulfil its obligation under Section 34 of the Convention to give effect to the privileges and immunities enjoyed by the Special Rapporteur under Article VI, Section 22(b), thereof.

61. If, for whatever reason, the Government of Malaysia disagreed with the Secretary-General's assertion of the Special Rapporteur's immunity from legal process, the competent authorities of that Government could have invoked the dispute settlement mechanism provided for under Article VIII, Section 29, of the Convention. Alternatively, in the absence of an agreed recourse to another mode of dispute settlement, they could have unilaterally or jointly with the United Nations referred the difference to the International Court of Justice for an advisory opinion in accordance with Article VIII, Section 30, of the Convention. Pending the resolution of any differences between the Government and the United Nations, the Government of Malaysia is required to ensure that all judgments and proceedings are stayed. The Government of Malaysia is called upon to do so, in operative paragraph 2 of the Council's decision 1998/297, pending receipt of the Court's advisory opinion which shall be accepted as decisive by the parties.

B. The Government of Malaysia is ultimately responsible for any costs, expenses or damages arising out of proceedings in its national courts

62. Finally, the United Nations maintains that, if a Government fails to take appropriate action to give effect to the immunities of the Organization or its agents and thereby allows the proceedings in its national courts to proceed, the Government concerned would be responsible for any actual costs, expenses or damages arising out of, or assessed by its courts.

63. In the Reparations Case (I.C.J. Reports, 1949, at p.174), the International Court of Justice stated that:

"The obligations entered into by States to enable the agents of the Organization to perform their duties are undertaken not in the interest of the agents, but in that of the Organization. When it claims redress for a breach of these obligations, the Organization is invoking its own right, the right that the obligations due to it should be respected.... In claiming reparation based on the injury suffered by its agent, the Organization does not represent the agent, but is asserting its own right, the right to secure respect for undertakings entered into towards the Organization.

"Having regard to the foregoing considerations, and to the undeniable right of the Organization to demand that its Members shall fulfil the obligations entered into by them in the interest of the good working of the Organization, the Court is of the opinion that, in the case of a breach of these obligations, the Organization has the capacity to claim adequate reparation, and that in assessing this reparation it is authorized to include the damage suffered by the victim or by persons entitled through him." (at p.184)

64. As the United Nations has maintained that the words that constitute the basis for the Plaintiffs' complaint were spoken by the Special Rapporteur in the course of the performance of his mission, the Special Rapporteur is entitled to full compensation for any costs, expenses or damages incurred by, or assessed to, him in connection with the legal proceedings against him. The Special Rapporteur is therefore entitled to be reimbursed by the United Nations for any such costs, expenses or damages. Also, in the event that the Organization is compelled to directly assume those costs, expenses and damages, the United Nations maintains that the Government of Malaysia is ultimately responsible for any and all such costs, expenses or damages actually paid or incurred by the Special Rapporteur and/or by the Organization directly or on his behalf.

VI. CONCLUSIONS

65. This Submission has endeavoured to establish that, subject to Article VIII, Section 29 and 30 of the Convention, the Secretary-General has exclusive authority to determine whether or not words or acts are spoken, written or done in the course of the performance of a mission for the United Nations and whether such words or acts fall within the scope of the mandate entrusted to a United Nations expert on mission. In this Submission, it has also been argued that such matters cannot be determined by, or adjudicated in, the national courts of the Member States parties to the Convention. The latter position is coupled with the Secretary-General's right and duty, in accordance with the terms of Article VI, Section 23, of the Convention, to waive the immunity where, in his opinion, it would impede the course of justice and it can be waived without prejudice to the interests of the United Nations.

66. The Secretary-General has acknowledged in this Submission that cases of conflict may arise as to whether an act was "official" or whether an expert had exceeded his or her mandate. In the event of such conflicts, the Convention expressly provides for appropriate modes of settlement of disputes with aggrieved parties, if immunity has not been waived by the Secretary-General, in its Article VIII, Section 29. Pursuant to Article VIII, Section 30, it also provides for the settlement of differences with Member States over the interpretation or application of the Convention. These are the appropriate procedures for settlement, not the disregard or adjudication of the Secretary-General's determination by national courts.

67. Unless it seeks the remedies provided for in Article VIII, Sections 29 and 30, of the Convention, when the Secretary-General maintains the immunity from legal process of an expert on mission for the United Nations, a Government of a Member State party to the Convention has an obligation, under Section 34 of the Convention to take whatever measures are necessary to give effect to that immunity. If it fails or refuses to do so, the Government concerned is ultimately responsible for any costs, expenses or damages arising out of the proceedings in its national courts.

68. Unless the Secretary-General's exclusive authority in this regard is upheld, the exclusively international character and the functional independence of officials and experts which Articles 100 and 105 of the Charter and the Convention aim to protect will be seriously undermined. Moreover, if national courts of Member States parties to the Convention are allowed to adjudicate the privileges and immunities of the United Nations and its officials and experts on mission, Sections 20, 23 and 30 of the Convention would be devoid of all meaning.

69. As a Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, Dato' Param Cumaraswamy is an expert on mission and is entitled to enjoy the privileges and immunities provided for under Article VI, Section 22, of the Convention. In particular, under Section 22(b), he is entitled to enjoy immunity from legal process of every kind in respect of words spoken or written and acts done by him in the course of the performance of his mission for the United Nations. As Malaysia acceded to the Convention without any reservation, the Special Rapporteur's immunity from legal process may be invoked as against his own State.

70. To the extent that the Secretary-General had determined that the words giving rise to the legal proceedings in Malaysia's national courts were spoken by Dato' Param Cumaraswamy in his official capacity as Special Rapporteur in the course of the performance of his mission for the United Nations and that he was therefore immune from legal process with respect thereto, the Government of Malaysia has an obligation to give effect to his immunity from legal process. By refusing to adequately inform its courts of the Secretary-General's determination of the scope and applicability of the Special Rapporteur's immunity from legal process and, in the alternative, to ensure that all judgements and proceedings are stayed pending the resolution of the difference arising between it and the United Nations, the Government of Malaysia failed to respect its obligation, under Section 34 of the Convention, to give effect to Article VI, Section 22(b) thereof. As such, this Submission has argued that the Government of Malaysia is ultimately responsible for any costs, expenses or damages which are actually incurred or paid out by the Special Rapporteur, or by the United Nations to him or on his behalf.

The Legal Counsel of the United Nations

2 October 1998